In its post-hearing comments, the Department did agree to delete the third sentence of this item because it was redundant. That deletion does not constitute a substantial change for purposes of Minn. Rule 1400.1100 (1985), and the rule, as amended, is necessary and reasonable.

9553.0035, subp. 6, Compensation For Services Performed By Individuals.

55. This subpart pertains to compensation paid to individuals for services performed for facilities. It states that compensation includes all remuneration paid "currently", accrued or deferred. It goes on to state that only compensation costs for the reporting period are allowable. The word "currently" apparently means that remuneration paid for services performed during the reporting period are included, as well as remuneration accrued or remuneration deferred for services performed during the reporting period. This is a necessary and reasonable provision to assign costs for services performed to the reporting year in which they are performed.

9553.0035, subp. 6, Item A.

56. This item states that compensation includes salaries, wages, bonuses, vested vacation and vested sick leave, and all other employee benefits paid for services performed. It also includes amounts paid for by the provider for the personal benefit of the provider or any employee; deferred compensation and individual retirement account contributions; and the costs of any capital assets, supplies, services or other in-kind benefits a provider or employee receives for their personal use. Ms. Harris questioned the distinction between vested and accrued benefits, and the meaning of the "in-kind" benefits mentioned in the rule. The word "vested" is defined in Part 9553.0020, subp. 48, as a "legally fixed unconditinal right to a present or future benefit." Vacation and sick leave benefits are not included in a facility's compensation costs unless they become vested in the year claimed. Accrued benefits are not recognized because they represent estimates of future costs that may never be incurred. For example, an employee discharged for misconduct may lose his right to accrued, but unused, vacation and sick leave benefits. In that situation, the facility will not incur the cost of those accrued benefits. Since the reimbursement rate is designed to reimburse ICF/MRs for costs actually incurred, the vesting requirement is necessary and reasonable. That requirement does not prohibit facilities from accruing sick leave and vacation benefits earned from one year to another. It merely disallows the cost of such accruals until they are used or become vested.

Including "in-kind" benefits in compensation is also necessary and reasonable. As noted in the Department's initial post-hearing comment, an in-kind benefit is a benefit received by an employee in lieu of cash. It follows, therefore, that it is a benefit received for personal services performed. Such benefits are obviously compensation as that term is generally understood. However, the limitation that such benefits be "in lieu of cash" is not contained in the rule. That confuses the meaning of the rule because benefits paid in lieu of cash may be substantially different from benefits for personal use. The Department refused to clarify the meaning of the rule noting that the Internal Revenue Service and the Department of Economic Security have exhaustive rules defining in-kind benefits. However, those rules have not been incorporated by reference. Therefore, they would not be

binding on the Department or a provider and would not be a reliable guide, even assuming that they are consistent. For those reasons, it is concluded that item A(4) is not sufficiently specific for purposes of Minn. Stat. § 14.02, subd. 4. Therefore, it violates a substantive provision of law for purposes of Minn. Stat. § 14.50 (1984). To correct this defect the Department must adopt a definition of "in-kind" benefits. The definition should make it clear whether they are benefits paid in lieu of cash for personal services and incorporate by reference the rules or regulations it finds are appropriate for its purposes. In addition, the Department may wish to consider deleting the words "for their personal use" on page 15, line 28. The benefit an employee receives may not be for his personal use but may be for the use of a spouse, a child, or a corporation owned.

9553.0035, subp. 6, Item B.

57. Under item B, ICF/MRs must have a written policy for the payment of compensation for services performed by individuals. Under subitem (1), the written policy must relate an individual's compensation to the performance of specified duties and to the number of hours worked by the individual. The rule is designed to ensure that facilities are reimbursed for services performed and that the level of compensation paid for the services provided is reasonable. Ms. Harris objected to this subitem. She argued that it requires standardized hours for all personnel. She noted that professional staff members are paid on a salaried basis and are not required to work a specific number of hours, but are required to work as many hours as it takes to perform the duties of their positions. Her comment requires some discussion. If a salaried employee's hours vary from day to day or from week to week, it would be impossible to retain that employee on a salary if the employee's compensation must be related to a specific number of hours worked. However, the Administrative Law Judge is not persuaded that the Department intends to abolish salaried positions or that the rule requires such a result. The rule requires that compensation be "related to the number of hours worked." Clearly, for employees who work by the hour compensation must be stated in terms of an hourly wage. However, for salaried employees whose hours vary, compensation can be related to hours worked in a more general way. For example, the plan could state that the employee will work full time or an average of 40 hours each week. However, since the rule is not specific on this point, it is recommended that the following sentences be added to subitem (1)

> Only the compensation of persons employed by the hour must be stated in terms of an hourly wage. The number of hours worked by salaried employees may be stated in terms of an average or with the notation that they are full time.

Such an amendment will identify the number of hours that the person will generally work, but it will not require facilities to reimburse all employees at an hourly wage. Comparisons can still be made to comparable postions under subitem (2) and the general number of hours to be worked can be compared to the actual hours worked using the records kept under subpart 5, item C.

58. Under subitem (2), the compensation plan adopted by a facility must also set compensation at a level which is consistent with the compensation paid to persons performing similar duties in the ICF/MR industry. Employees

HCFA-179 # 86-3 Date Rec'd 3-20-86
Supercedes _____ Date Appr. 7-22-86
State Rep. In. V.2. Date Eff. 1-1-86

covered by a collective bargaining agreement do not have to be covered by the facility's policy if the collective bargaining agreement otherwise meets the requirements of the policy set forth in the rule. Ms. Harris argued that this requirement will be difficult to apply or enforce because of the variety of different types of providers and job descriptions in the industry. She expressed concern that the Department's enforcement will not be consistent for those reasons. The Department enacted this provision because of its concern that compensation paid to family members might be substantially more than that paid in arm's length transactions. In spite of the diversity which exists among the various ICF/MRs and the differences between job descriptions used by them, the Department still must attempt to verify the reasonableness of salaries paid. Because that may be difficult to do in any particular case does not relieve the Department of its responsibility to make sure those salaries are the level an efficient facility would pay, and that reimbursement is not made for services which are not performed. Although there are differences between facilities, as well as differences in the duties of various employees, the use of an industry standard for evaluating the reasonableness of salary levels is necessary and reasonable. There are obvious similarities between providers which justify using the standard proposed.

59. Mr. Furlong argued that the requirement is impermissibly vague because it does not state how the compensation paid to individuals in the industry will be determined. That argument is not persuasvie. What is consistent with industry practice will depend on the size of the facility, the types of residents served and the job duties of its employees. No rules or formula can be devised which can be used to compute reasonable levels given those variables. Further specificity is not feasible. Instead, each facility's plan will require case-by-case consideration. To fulfill its obligations under the rule, a facility will be required to use any available salary surveys and review the compensation paid to state hospital employees to determine reasonable salary levels. If that is not sufficient, it will be required to conduct its own salary surveys to determine appropriate compensation levels. Employers customarily make such evaluation and facilities may be required to do so here. The rule does not mandate equality. It is designed to require salaries that are within a reasonable range as reflected in the industry.

9553.0035, subp. 6, item D.

60. Under this item compensation other than accrued vested vacation and accrued vested sick leave must actually be paid within 121 days after the close of the reporting year to be allowable. This is a necessary and reasonable provision for ensuring that ICF/MRs do not obtain reimbursement for costs that are not paid. Vested benefits are excluded from the payment requirement because there is a sufficient guarantee of future payment to allow them. The rule does not state how deferred compensation must be paid to be allowable. Presumably, however, deferred compensation is paid when it is set aside according to the plans or agreements in effect. If that is not the Department's intent, the rule should be clarified.

The last sentence of the rule provides that compensation which is not paid in cash or by negotiable instrument within 121 days of the close of the reporting period is not allowable in that reporting year. Generally speaking,

HCFA-179 # 86-3 Date Rec'd 3-20-86
Supercedes _____ Date Appr. 7-22-86
State Rep. In. V. 2. Date Eff. 1-1-86

a facility would be able to provide an employee with a note if it did not have the cash to pay compensation earned. In those cases, the salary would be allowable in the reporting year. However, if the employee refuses to accept a note, or if an employee's salary is erroneously calculated, and payment is delayed past the 121-day deadline, the rule does not clealy state whether that compensation will be allowable when paid. The Department implies that it would not, and the language in the first paragraph of subpart 6 is unclear on that point. Since the Department has not addressed the need and reasonableness of disallowing delayed salary payments in the year in which they are paid, such a construction of the rule would be unnecessary and unreasonble and may not be given to it. Moreover, the Department has no authority to regulate the prompt payment of compensation for the benefit of employees. Since delayed compensation payments are costs that must be incurred, they are allowable in the reporting year when they are paid under Minn. Stat. § 256B.501, subd. 3. Since the Department implies that they are not allowable, and since the rule does not clearly address that issue, it must be clarified. In its present form it is impermissibly vague for purposes of the Administrative Procedure Act. To correct this defect a new sentence must be added to item D to read as follows:

> Payments made after the 121-day period are allowable in the reporting year made.

9553.0035, subp. 6, item E.

61. This rule requires that the compensation paid to part time employees be proportional to that paid to full time employees. It was pointed out by several commentators that the salaries paid in the industry for part time and full time work are not proportional, and that cost increases could result if proportional compensation is required. For example, Peter Sajevic explained that many facilities have live-in house parents. On an hourly basis their compensation is lower than that paid to the part time employees who relieve them on weekends and during vacation periods. In order to make their compensation proportional, the house parents' compensation would have to be substantially increased because the part time employees' compensation, if reduced, would violate minimum wage laws. The Department's post-hearing response to this dilemma was that the rule applies to the situation where less than full time services are provided and is silent with respect to overtime. That response addressed only one aspect of the problem Mr. Sajevic explained. Consequently, it is concluded that the need and reasonableness of this provision was not established with an affirmative presentation of facts in the SNR or in the record, as required by Minn. Stat. § 14.14, subd. 2 (1984). Although the Department did not say so, the rule appears to be designed to prevent abuses in the payment of salaries to relatives or friends of facility owners and to prevent a part time employee from being paid at twice the rate as a full time employee performing similar duties. Assuming that it is its concern, it is partially covered by the rule requiring that the compensation paid to employees be consistent with the salaries paid in the ICF/MR industry. In determining whether they are consistent, of course, it is reasonable to examine the salaries paid to full time employees, but it was not shown to be either reasonable or necessary to require that they be proportional. Full time employees commonly receive vacation, sick leave, and insurance benefits part time employees do not receieve, and they may be qualified for a retirement program unavailable to part time employees. These

are all elements of compensation under item A. Furthermore, full time employees may have greater knowledge, experience and seniority than part time employees. Conversely, some part time employees are paid at a premium because they are on-call or part time. Others are paid for a minimum number of hours every time they are called to work, even if they do not work the minimum specified. Since the rule does not consider any of these factors, it is unreasonable and must be deleted.

9553.0035, subp. 7, Limitations On Related Organization Costs.

62. Item A of this subpart provides that the costs of services, capital assets and supplies directly or indirectly furnished to a provider by a related organization may be included as an allowable cost of the facility at the purchase paid by the related organization or at the cost incurred by the related organization, if the prices or costs claimed do not exceed the prices of comparable assets, supplies and services that could be purchased elsewhere. The rule provides that the related organization's costs must not include an amount for mark-up or profit. Ms. Harris criticized that limitation. She stated that it penalizes provider groups having businesses which sell assets, supplies or services to their facilities, and discourages them from providing discounts. She argued that such a provision will encourage facilities to go outside for services where the costs may indeed be higher, and questioned the meaning of the word "cost" as used in the rule. The Department's explanation for the proposed rule is in the SNR (p. 24). It is stated there that it is necessary to consider the costs attributed to related organizations in order to prevent the payment of public funds for activities unrelated to resident care and that it is necessary to insure that those costs are not excessive when compared to the prices of comparable services purchased in an arm's-length transaction. It has also determined that related organization cost cannot include a mark-up or a profit since these transactions are equivalent to doing business with oneself.

63. Allan Baumgarten, staff attorney for the Program Elvaulation Division of the Office of the Legislative Auditor, discussed the legislative concerns that lead to the 1983 amendments requiring the adoption of new ratemaking rules. He noted that Legislators were concerned that the ICF/MR industry was developing many of the characteristics of the nursing home industry (the "nursing home syndrome"), such as the broad development of related companies to provide services to ICF/MRs, and that such horizontal and vertical integrations were seen as detrimental to the interests of the state. The rule is specifically designed to address those concerns and to encourage arm's-length transactions. The Department has a duty to ensure that the costs claimed by a facility are at economical and efficient levels. In arm's-length transactions, the facility has a natural desire to limit the prices it pays and there is some assurance that the prices charged are at a competitive level. However, in transactions between related organizations, a facility's desire to operate efficiently may be offset by its desire for profits, and there is no assurance that the costs of such transactions are at competitive levels. Therefore, the Department requires that transactions between related organizations be at cost. This is a necessary and reasonable provision. In transactions between related organizations there is no assurance that prices are competitive and do not involve excessive profits. Moreover, it is not feasible to audit every transaction between related organizations to determine if the costs involved were at competitive levels. Cost comparisons after the

HCFA-179 # 86-3 Date Rec'd 3-20-86
Supercedes _____ Date Appr. 7-22-86
State Rep. In. V. 2. Date Eff. 1-1-86

fact would be a monumental task and price comparisons may be impossible to make. Therefore, the rule proposed is necessary and reasonable. It is similar to the requirements in 42 C.F.R. § 405.427, which governs payments to related organizations under the Medicare Program.

Thus, for capital assets and supplies, the facilities allowable cost is equal to the purchase price paid by the related organization. For services, the facility's allowable cost is equal to the cost incurred by the related organization to provide the service. In both cases however, the facility's allowable cost cannot exceed the price of comparable goods and services that could be purchased elsewhere. Several persons questioned how the costs incurred to provide services would be computed. The rule does not directly address that issue. However, the costs recognized must be computed using generally accepted accounting principles and could not include costs the facility could not claim under the rule. If a different approach is intended by the Department, the rule should be clarified.

64. The second paragraph of item A states that except for the rental or leasing of facilities, if the related organization sells goods and services to non-related organizations, the facility's costs can be no more than the price charged by the related organization to non-related organizations, if sales to non-related organizations constitute at least 50% of the related organization's total annual sales of such goods and services. This rule is unclear. Does it mean that a facility may use the price charged by the related organization -- which may include a profit -- or only that the price charged by the related organization establishes the upper limit on allowable costs? The ambiguity makes the rule impermissibly vague for purposes of Minn. Stat. § 14.02, subd. 4, resulting in a substantive violation of law for purposes of Minn. Stat. § 14.50. To correct this defect, the rule must be amended to clearly state whether the price charged can be claimed as an allowable cost if the 50% standard is met. If that is intended, the Department may wish to follow the suggestion made by Mr. Larson (Comment, p. 28). Since the price charged by a related organization meeting the 50% standard could reasonably be determined to have a sufficient guarantee of competiviness, the Department could reasonably treat the costs of those transactions differently from the way it treats costs when the 50% standard is not met.

9553.0035, subp. 7, item C.

65. Under this item the cost of a capital asset owned by a related organization and used by the facility may be included in the allowable cost of the facility. When the capital asset is sold or otherwise disposed of by the related organization and the depreciation on the asset has been claimed as a facility cost, any gain realized from the sale by the related organization must be transferred to the facility as an offset in the facility's property-related cost category. Jean Searles, a part owner of Resa, Inc., noted that she provides central office services to Resa, Inc. out of her own home and that this rule would require her, upon the sale of that home, to pay any gain realized from that sale to the facility to reduce its property-related costs. The Department's SONR does not establish the need and reasonableness of such a result with an affirmative presentation of facts. This violates Minn. Stat. § 14.14, subd. 2 (1984). Where an individual or other related organization owns a capital asset, and where only part of the

depreciation of that capital asset is claimed as an allowable cost by a provider, it is unreasonable to require that any gain realized upon the sale of that asset be transferred to the facility. To correct this defect the sentence commencing on line 17 and ending on line 22 must be deleted or rewritten to provide a formula for prorating the gain realized on that portion for which depreciation is claimed, or to refer to the procedures in Part 9553.0060, subp. 1, item D. The whole gain on the sale of a house cannot be used as an offset if depreciation is claimed on only one room.

9553.0035, subp. 8. Capitalization.

66. This subpart governs the capitalization of capital assets. It generally requires that the cost of any capital asset listed in the Estimated Useful Lives of Depreciable Hospital Assets must be capitalized and that any capital assets not listed in those guidelines must be capitalized if they have a useful life of more than two years and cost more than $500. Any repair costing $500 or less may be treated as an expense under the proposed rule. Any repairs treated as expenses must be classified in the plant operation and maintenance cost category. Ms. Harris argued that repair costs resulting from destructive resident behavior should be classified in the program cost category rather than in the plant operation and maintenance cost category. The Department rejected such an amendment to the rule. In its view repair costs are not program costs. Since increases in maintenance costs are subject to different limitations than increases in program costs, their classification is important. The record shows that the resident population in ICF/MRs is in a state of flux and that more difficult residents are now being served. Due to this change, more destructive residents will be coming into ICF/MRs from state hospitals. Therefore, a facility's maintenance operating costs may increase at a faster pace than the limitation on maintenance costs allows. Although the amount of the additional costs involved is not known, the Department failed to establish the need and reasonableness of assigning such repair costs to the maintenance cost category. That violates Minn. Stat. § 14.14, subd. 2. To correct this defect, those costs must be included in program operating costs. Although they are maintenance costs as that term is normally understood, the limitation on maintenance costs renders their classification to that category unreasonable. Property destruction is not like normal wear and tear and is not like food and utilities. A changing resident population will not result in a greater need for food or utilities, because new residents will not eat more food or need more heat; however, they can be expected to do more damage.

67. Item B of subpart 8 also provides that if the cost of a repair significantly increases the productivity of a capital asset over its original productivity, the cost of the repair must be capitalized. Ms. Harris argued that this provision is ambiguous and she questioned whether repairs which increase productivity must also increase the useful life of an asset. The Department did not respond to her comment and its SNR does not discuss the purpose of this language. Apparently it is designed to treat repairs that significantly increase an asset's original productivity as costs that must be capitalized regardless of the amount of money expended or the changes, if any, which occur in the useful life of the asset. There are two problems with the rule as proposed: it will be difficult to determine when the productivity of an asset is "significantly increased" and the rule itself appears to only

partially address the whole subject of improvements to capital assets. Capital assets are defined in part 9553.0020, subp. 5. In that definition additions to capital assets are mentioned but improvements to capital assets are not. Moreover, changes made to a capital asset which are designed soley to increase its productivity do not clearly come within the definition of repairs in part 9553.0020, subp. 40. For example, if a facility installs a new heat exchanger in its furnace which increases its efficiency by 15% and thereby lowers its fuel costs, it is unclear whether such a "repair" would significantly increase its productivity.

68. The Department appears to be attempting to distinguish repairs that are made to restore an asset to good condition after decay, injury, dilapidation or partial destruction from repairs made to improve an asset by increasing its productivity, rendering it useful for other purposes or making it more useful for the same purpose. Apparently the rule is designed to cover a situation where, for example, a new heat exchanger is installed not necessarily because the old one is in need of fixing or maintenance but because a new one will increase efficiency and reduce costs. Improvements have been recognized as meaning labor and materials expended for the purpose of rendering an asset useful for purposes other than those for which it was originally used or more useful for the same purpose. Significant increases in productivity would come within the "more useful for the same purpose" language that has been recognized. 42 C.J.S., Improvement, p. 416. For these reasons it is suggested that the Department amend item B to read as follows:

> B. Repairs that cost $500 or less may be treated as an expense. Repairs which cost more than $500 and which extend the estimated useful life of the asset by at least two years must be capitalized. Improvements made solely for the purpose of making an asset useful for purposes other than those for which it was originally used or more useful for the same purposes must also be capitalized if the cost exceeds $500 [or some other figure]. All repairs treated as an expense must be classified in the plant operation and maintenance cost category unless they result from destructive resident behavior.

Under this language, any repair or improvement that costs $500 or less may be treated as an expense. Repair costs in excess of $500 must be capitalized if they extend the useful life of an asset by at least two years or were made soley for the purpose of making the asset useful for other purposes or more useful for the same purpose. Thus, in the example above, a facility purchasing a new heat exchanger only for purposes of efficiency would be required to capitalize the costs if they exceed $500. However, a facility who obtains a more efficient heat exchanger because the old one was defective and needed replacement would not be required to capitalize the costs unless they exceed $500 and extend the useful life by at least two years. This amendment eliminates the necessity of trying to determine when a repair is an improvement or when productivity is substantially increased. It simply treats all improvements necessarily resulting from a repair as a repair and requires all other improvements to be capitalized if they exceed $500. Of course, the Department could reduce the $500 figure or eliminate it altogether.

HCFA-179 # 86-3 Date Rec'd 3-20-86
Supercedes V.2, Date Appr. 7-22-86
State Rep. In. ____ Date Eff. 1-1-86

9553.0035, subp. 9, Working Capital Interest Expense.

69. Working capital interest expense as defined in the rules is the interest incurred on working capital loans made by a facility during the reporting year. Several persons commented on the clarity of the language used, and as a result, the Department has proposed various amendments. As amended, subpart 9A will read as follows:

> Subp. 9. Working capital interest expense. Working capital interest expense is allowed subject to the requirements of items A and B.
>
> A. Working capital interest expense and working capital debt incurred prior to January 1, 1986, is allowable under 12 MCAR §§ 2.05301 - 2.05315 [Temporary].

• • •

This is a necessary and reasonable provision. It merely states that if a working capital debt was incurred before January 1, 1986, the interest expense on that debt is allowable to the extent authorized in the temporary rules adopted by the Department. The working capital interest expense incurred on working capital debts made on or after January 1, 1986 are not subject to any limitations under the rule except as provided in item B, as amended. Although the provisions of Rule 53T were criticized by several individuals, the provisions of that rule, which do not expire until December 31, 1985, are not subject to need and reasonableness review in this proceeding. It is not appropriate to go back and readjust or reexamine the limitations that were properly imposed upon working capital interest expense under the temporary rule.

9553.0035, subp. 9, item B.

70. This item (former item C) was relettered by the Department's post-hearing amendments. It governs the working capital interest expense of facilities constructed after January 1, 1984. For interim and settle-up rates, their working capital interest expense cannot exceed 1% of the historical operating costs projected (for interim rates) or 1% of those actually incurred (for the settle-up rate). For the rate year following settle-up, working capital interest expense cannot exceed 80% of that allowable in the settle-up cost report. The 1% limitation in the rule is based on the working capital interest expenses of 11 facilities on interim rates when the SNR was developed. Their rates ranged from .19 to 8.32%, with the average being .3%. Four of those facilities would be over the limits in the proposed rule. ARRM suggested a 2.5% limitation in place of the 1% limitation proposed by the Department during the interim period. Subitem 1 conflicts with the provisions of Rule 53T (12 MCAR § 2.05309E.3.a). Under Rule 53T facilities established or constructed prior to December 31, 1985 (after January 1, 1984) have working capital interest expense limited to 2.5% of the facility's allowable operating costs. Subitem 1 retroactively reduces that percentage. Such a retroactive reduction in allowable costs is unauthorized. This constitutes a substantive violation of law for purposes of Minn. Stat. §§ 14.05, subd. 1 and 14.50 (1984). To correct this defect the rule must be deleted or it must be amended so that facilities

constructed or established prior to January 1, 1986 are treated in a manner consistent with the requirements of the Rule 53T. Changing the date in the first paragraph of item B to January 1, 1986 would accomplish that.

71. Since the Department intends to impose limitations on working capital interest expense upon facilities constructed or established after January 1, 1986, as item B would do, the need and reasonableness of such a prospective rule must be considered. The 1% limitation proposed by the Department is based on a very small sample of providers and would eliminate the working capital interest expense of approximately 37% of those examined. Although an examination of the costs incurred by a large number of facilities can be used to set limitations on costs under the premise that if half of them are able to function with lower cost levels the other half should be able to do so too, the Administrative Law Judge is not persuaded that such an approach is sufficiently accurate when only 11 facilities are examined and no other supporting data regarding the situations of those facilities is presented. In addition, limiting the working capital interest expense of facilities constructed after January 1, 1986 differently from those constructed before that date makes little sense, and no rationale was presented by the Department to explain a 1.5% reduction from the levels authorized in the Rule 53T. For that reason it is concluded that the 1% limitation contained in item A is not necessary and reasonable in any prospective rule adopted by the Department and if the rule is retained the former 2.5% limitation must be used.

Under subitem (2) working capital interest expense incurred by a newly constructed or established facility is limited to 80% of that allowed in the settle-up cost report. A limitation of this nature is consistent with Rule 53T and is necessary and reasonable on a prospective basis because the need for working capital interest expense by such facilities should decrease after the facility has been in operation and its situation has stabilized. However, the Department should reexamine the need for this limitation in view of the fact that the working capital interest expenses of other existing facilities is not subject to any limitation after January 1, 1986.

9553.0035, subp. 10, Retirement Contributions.

72. This subpart limits the costs of retirement contributions for employees to those made to a pension plan or a profit sharing plan approved by Internal Revenue Service. Mr. Furlong stated that the rule does not conform to the provisions of the Internal Revenue Code. He noted that the Internal Revenue Service does not "approve" such plans. He said that they either are qualified or non-qualified and that non-qualified plans can comply with the Internal Revenue Code and IRS regulations. He suggested that the rule be amended to delete the word "approved" on page 19, line 16 and that additional language be added which would simply provide that plans in compliance with the Internal Revenue Code are allowable. As Mr. Furlong pointed out, pension and profit-sharing plans are either qualified or non-qualified. However, an employer may submit his qualified plan to the Internal Revenue Service and obtain their "approval." This is done so that employers can find out in advance that their plans comply with the requirements of qualified plans and will be taxed accordingly. For these reasons, the proposed rule is insufficiently specific for purposes of Minn. Stat. § 14.02, subd. 4 (1984).